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THE ARMED CAREER CRIMINAL ACT: A SEVERE IMPLICATION WITHOUT EXPLANATION

The terms of the act do not authorize the infliction of a penalty greater . . . Is there a safe implication that authority to inflict a greater penalty was intended to be conferred? The objections to this seem to me too strong to be overcome. In the first place, mere implication can hardly ever be safe ground on which to rest a penalty, and when penalties of unlimited magnitude are the subjects of the implication, the danger of making it, and the improbability of its correctness, are proportionably increased.

—Justice Benjamin Robbins Curtis¹

INTRODUCTION

The Armed Career Criminal Act (“ACCA”) mandates imprisonment for “not less than fifteen years” for a felon in possession of a firearm with three or more prior convictions for violent felonies or serious drug offenses.² However, the ACCA is silent as to a maximum sentence.³ Although Congress has amended the ACCA several times, its plain language has clearly prescribed a penalty of “not less than fifteen years” since it was enacted in 1984.⁴

Many people believe the phrase “not less than fifteen years” implies that a judge may sentence any amount of years above fifteen, including life. However, that interpretation is oversimplified and wrong in a statutory and sentencing context. Rather than a range from fifteen years to life, the “not less than fifteen years” phrase should be read to authorize a fixed term of fifteen years imprisonment.

The difference is both obvious and significant. Under the ACCA, either every sentence must be fifteen years or judges have discretion to sentence in a range from fifteen years to life. As of now, the U.S. Supreme Court has held that appellate courts should review district court sentences under an abuse of discretion standard, which is highly deferential.⁵ Justice Scalia and Justice Thomas believe that the Sixth Amendment prohibits appellate review of the substance of trial judges’ discretionary sentencing choices imposed within the

1. Stimpson v. Pond, 23 F. Cas. 101, 102 (D. Mass. 1855).

2. 18 U.S.C. § 924(e) (2012).

3. See *id.*

4. *Id.*

5. Gall v. United States, 552 U.S. 38, 59–60 (2007).

statutory minimum and maximum.⁶ They reason that district courts must be able to sentence to the maximum of the statutory range granted by Congress and that the sentencing judge's discretionary power must be absolute and unreviewable.⁷ To that end, if the ACCA contains a range of fifteen years to life, then it will be very difficult, and nearly impossible in Scalia's and Thomas's view, for a defendant to successfully appeal any sentence within that range.

This Comment will argue that the "shall be . . . imprisoned not less than fifteen years" language in the ACCA does not contain an implied maximum of life imprisonment; rather the statute's text, structure, legislative history, and current adjudicative mechanism, along with Supreme Court Justices' viewpoints, support the translation of the imprisonment language to constitute a fixed term of fifteen years.

I. BACKGROUND OF THE ACCA

A. *General Background*

The ACCA in its current form states:

[A] person who violates . . . 922(g) . . . and has three previous convictions by any court referred to in . . . 922(g)(1) . . . for a violent felony or a serious drug offense, or both . . . shall be . . . imprisoned not less than fifteen years, and . . . the court shall not suspend the sentence of, or grant a probationary sentence to, such person.⁸

The felon in possession statute, 18 U.S.C. 922(g), which is the underlying crime of the ACCA, carries an expressed maximum term of ten years imprisonment.⁹ The enhanced ACCA sentence becomes available to the sentencing court when the individual convicted under 18 U.S.C. § 922(g) is not just a one-time felon, but has three or more prior violent felonies¹⁰ or serious

6. *Rita v. United States*, 551 U.S. 338, 370 (2007) (Scalia, J., concurring).

7. *Id.*

8. 18 U.S.C. § 924(e)(1). Section 922(g) outlaws a list of certain individuals, one of which is a prior felon, from shipping or transporting in interstate or foreign commerce, or possessing in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. *See id.* § 922(g). It is widely known as the federal felon in possession of a firearm statute. Section 922(g)(1) states, "[W]ho has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." *Id.* § 922(g)(1).

9. *Id.* § 924(a)(2).

10. The term "violent felony" under the ACCA refers to any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that either has as an element the use, attempted use, or threatened use of physical force against the person of another or is burglary, arson, or extortion,

drug offenses.¹¹ In 2012, the average sentence length for offenders with only one or two prior felonies under § 922(g) was forty-six months, whereas the average sentence length for offenders with three or more prior felonies sentenced under the ACCA was 180 months.¹²

The ACCA's enhanced sentence applies in cases of mere possession, regardless of whether the defendant used the firearm or was engaged in any other criminal conduct at the time.¹³ Further, the ACCA also criminalizes a defendant in possession of ammunition, even without a firearm.¹⁴ In *United States v. Cardoza*, the First Circuit upheld the district court's imposition of a nineteen-year imprisonment sentence to a defendant who was only in possession of *one* bullet.¹⁵ As long as the defendant has the requisite prior convictions, regardless of the age that they occurred, simply possessing a firearm or ammunition qualifies for the underlying offense of the ACCA.¹⁶

Congress enacted the ACCA in 1984 to invoke federal jurisdiction to incapacitate individuals committing a large portion of crimes, because state prosecutorial resources were inadequate and failed to address this problem.¹⁷ State law enforcement traditionally dealt with violent felonies.¹⁸ However, many states lacked sufficient resources to confront increasing problems of court congestion and prison overcrowding in their localities.¹⁹ Consequently, state legislators proved reluctant to strengthen their "revolving door" sentencing statutes to allow for longer confinement in their already overpopulated prisons.²⁰ As a result, judges regularly sentenced repeat felons to brief lengths of imprisonment, and frequently even probation.²¹ Congress

involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another. *Id.* § 924(e)(2)(B).

11. The term "serious drug offense" refers to almost all drug offenses under either state or federal laws that carry a maximum term of imprisonment of ten years or more prescribed by law. *Id.* § 924(e)(2)(A).

12. *Quick Facts*, USSC.GOV, http://www.ussc.gov/Quick_Facts/Quick_Facts_Felon_in_Possession_of_a_Firearm.pdf (last visited Oct. 16, 2014).

13. David M. Zlotnick, *The Future of Federal Sentencing Policy: Learning Lessons from Republican Judicial Appointees in the Guidelines Era*, 79 U. COLO. L. REV. 1, 52 (2008).

14. *United States v. Cardoza*, 129 F.3d 6, 9 (1st Cir. 1997).

15. *Id.* (emphasis added).

16. 18 U.S.C. § 924(e)(2)(A).

17. Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1177 (2010).

18. *See id.* (discussing the legislative history of the Armed Career Criminal Act).

19. *Id.* at 1178 n.220.

20. 98 CONG. REC. 19,855–56 (1983) (statement of Sen. Nunn).

21. On page 29 in the Armed Career Criminal Act 1983 Senate Hearing, William Cahalan testified that in Wisconsin that year, 63% of the adult males convicted of a felony—who had previously been convicted of another felony—were placed on probation. In Florida that same year, 80% of those convicted of a felony were placed on probation. *Armed Career Criminal Act of 1983: Hearing on S. 52 Before the S. Comm. on the Judiciary*, 98th Cong. 29 (1983)

recognized that many repeat felons did not lose one day of freedom as a result of many states' inability to incarcerate them.²² Accordingly, Congress passed the ACCA to increase the participation of the federal law enforcement system by creating a consistent federal penalty to reduce crimes committed by armed, habitual criminals.²³

All of the courts of appeals that have interpreted the ACCA read it to contain an implied maximum sentence of life imprisonment.²⁴ The Supreme Court has said in mere dicta that the ACCA contains a maximum of life, but the Court has never ruled on this issue.²⁵ Statements in a Supreme Court opinion, which are not necessary to the decision, are not binding authority.²⁶

Although no court has endorsed such a reading, it bears to mention that the ACCA certainly precludes implication of a greater maximum penalty than life imprisonment without parole. The Supreme Court has noted that a "life sentence without parole is the second most severe penalty permitted by law."²⁷ Since its enactment, the ACCA has always prohibited parole.²⁸ Accordingly, when courts imply life imprisonment as the maximum sentence permitted by the ACCA, it is necessarily without the possibility of parole. If a court sentences an offender to life plus any number of years, it also is equivalent to life without parole.²⁹ Because the imposition of the death penalty requires

[hereinafter *Hearings on S. 52*] (statement of William Cahalan, Prosecuting Attorney of Wayne Cnty., Va.). The record from the Senate hearing on the Armed Career Criminal Act of 1982 indicates that in Pennsylvania, for those offenders who committed robbery with a firearm and had two prior robbery or burglary convictions, the average time of incarceration was less than four years; for those convicted and sentenced for burglary who had two or more prior burglary or robbery convictions, the average sentence was less than ten months. S. REP. NO. 97-585, at 35-36 (1982).

22. *Hearing on S. 52*, *supra* note 21.

23. 98 CONG. REC. 26,901 (1984).

24. *United States v. Walker*, 720 F.3d 705, 708 (8th Cir. 2013); *United States v. Weems*, 322 F.3d 18, 26 (1st Cir. 2003); *United States v. Brame*, 997 F.2d 1426, 1428 (11th Cir. 1993); *United States v. Bland*, 961 F.2d 123, 128 (9th Cir. 1992); *United States v. Wolak*, 923 F.2d 1193, 1199 (6th Cir. 1991); *United States v. Fields*, 923 F.2d 358, 362 (5th Cir. 1991); *United States v. Tisdale*, 921 F.2d 1095, 1100 (10th Cir. 1990); *United States v. Williams*, 892 F.2d 296, 304 (3d Cir. 1989); *United States v. Blannon*, 836 F.2d 843, 845 (4th Cir. 1988); *United States v. Jackson*, 835 F.2d 1195, 1197 (7th Cir. 1987); *Walberg v. United States*, 763 F.2d 143, 148-49 (2d Cir. 1985).

25. *Custis v. United States*, 511 U.S. 485, 487 (1994).

26. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 737 (2007); *Cohens v. Virginia*, 19 U.S. 264, 399-400 (1821).

27. *Graham v. Florida*, 560 U.S. 48, 50 (2010) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991)) (internal quotation marks omitted).

28. See H.R. REP. NO. 98-1073, at 7-8 (1984) (The Resolution states that such person "shall not be eligible for parole").

29. See *Vance v. Pennsylvania Bd. of Prob. & Parole*, No. 4:08-CV-1185, 2009 WL 302054, at *3 (M.D. Pa. Feb. 5, 2009).

constitutional protections clearly absent from the ACCA, there is no existing higher maximum penalty to imply than the second most severe penalty permitted by law: life without parole.

B. *The Three Previous Convictions Requirement*

Unlike the ACCA's sentencing phrase, the predicate offenses provision has been the subject of frequent Supreme Court litigation. There have been thirteen Supreme Court cases that have attempted to clarify the statute's language with regard to its three previous convictions requirement.³⁰ The requirement encompasses a defendant's past convictions under both state and federal criminal statutes.³¹ But, given the various definitions of different states' crimes, past convictions may or may not qualify under the definitions the ACCA prescribes for violent felonies and serious drug offenses.

In *Taylor v. United States*, the Supreme Court established a rule to determine when a defendant's prior conviction counts as one of the ACCA's enumerated predicate offenses.³² One of the enumerated predicate offenses in the ACCA is burglary.³³ The Court noted that the ACCA fails to define specific elements of burglary, and therefore interpreted it to require the elements of a generic burglary offense.³⁴ In assessing whether the defendant's prior burglary conviction under California law sufficed for generic burglary under the ACCA, the Court adopted a "formal categorical approach."³⁵ Under this approach, the sentencing court may look only to the statutory definitions (i.e. the elements) of a defendant's prior convictions and not to the particular facts underlying those particular convictions.³⁶

If the relevant statute (in *Taylor*, the California burglary statute) has the same elements as the "generic" ACCA crime (burglary), then the prior conviction can serve as one of the three predicate offenses.³⁷ Similarly, if the

30. *Descamps v. United States*, 133 S. Ct. 2276, 2279 (2013); *Sykes v. United States*, 131 S. Ct. 2267, 2272–73 (2011); *McNeill v. United States*, 131 S. Ct. 2218, 2221 (2011); *Johnson v. United States*, 559 U.S. 133, 134 (2010); *Chambers v. United States*, 555 U.S. 122, 124 (2009); *United States v. Rodriguez*, 553 U.S. 377, 380–81 (2008); *Begay v. United States*, 553 U.S. 137, 139 (2008); *Logan v. United States*, 552 U.S. 23, 26 (2007); *James v. United States*, 550 U.S. 192, 195 (2007); *Shepard v. United States*, 544 U.S. 13, 16 (2005); *Daniels v. United States*, 532 U.S. 374, 376 (2001); *Custis*, 511 U.S. at 487; *Taylor v. United States*, 495 U.S. 575, 577–78 (1990).

31. 18 U.S.C. § 924(e) (2012).

32. *Descamps*, 133 S. Ct. at 2283 (citing *Taylor*, 495 U.S. at 607).

33. The ACCA says "any crime punishable by imprisonment for a term exceeding one year . . . that . . . is burglary . . ." qualifies for a violent felony for purposes of a predicate conviction. 18 U.S.C. § 924(e)(2)(B).

34. See *Descamps*, 133 S. Ct. at 2283 (citing *Taylor*, 495 U.S. at 607).

35. *Id.*

36. *Id.*

37. *Id.*

relevant statute defines the crime more narrowly, then the prior conviction can serve as an ACCA predicate because one guilty of the narrower crime's elements is necessarily guilty of the broader generic crime's elements.³⁸ However, if the statute is broader than the generic crime, then a conviction under that statute cannot count as an ACCA predicate, even if the defendant's acts would satisfy all of the generic crime's elements.³⁹ The key is the elements of the crime, not the facts.⁴⁰

To illustrate this concept, let us look closer at the situation in *Taylor*. The predicate offense at issue was a conviction under a California burglary statute.⁴¹ It provides that a person who enters certain locations, lawfully or unlawfully, with intent to commit larceny or any other felony, is guilty of burglary.⁴² This statute is broader than generic burglary because most burglary statutes require the entry into the location to be unlawful.⁴³ Under the California statute, one who enters a grocery store and shoplifts could be convicted.⁴⁴ But, that same defendant could not be convicted under a generic burglary statute because it requires unlawful entry.⁴⁵ As a result, the California statute was overbroad and the defendant's prior conviction did not qualify as one of the three required predicate offenses for purposes of the ACCA, even though his actual conduct may have fit under a generic burglary statute.⁴⁶

In *Shepard v. United States*, the Supreme Court applied a "modified categorical approach," which allows the sentencing court to look beyond the statutory elements to the charging paper and jury instructions used in a case.⁴⁷ The defendant had a prior conviction under a Massachusetts burglary statute with alternative elements—the statute prohibited entry into a building and, additionally, prohibited entry into boats and cars.⁴⁸ This is an example of a divisible statute, meaning it contains multiple alternative versions of the crime.⁴⁹ One of the three alternatives (entry into a building) corresponds to an element in generic burglary, whereas the latter two alternatives (entry into a boat or car) do not.⁵⁰ Therefore, no one could know, merely looking at the

38. *Id.*

39. *Descamps*, 133 S. Ct. at 2283.

40. *Id.*

41. *Id.* at 2282.

42. *Id.*

43. *Id.*

44. *Descamps*, 133 S. Ct. at 2282.

45. *Id.* at 2283.

46. *Id.* at 2286.

47. *Id.* at 2283–84.

48. *Id.* at 2284.

49. *Descamps*, 133 S. Ct. at 2284.

50. *Id.*

Massachusetts statute, which alternative the defendant was convicted of.⁵¹ However, since the statute was divisible, the Supreme Court authorized the sentencing court to examine a limited set of materials, namely the terms of the plea agreement or transcript of colloquy between the judge and defendant, to determine if the defendant had pled guilty to entering a building, car, or boat.⁵² The Court emphasized the narrow scope of the modified categorical approach: it was not to determine the facts of the defendant's underlying conduct in his prior conviction, but only to determine whether he pled to the version of the crime in the Massachusetts statute that corresponded to the generic offense (burglary of a building).⁵³

The Court reasoned that the modified categorical approach would be applicable in a typical case brought under a divisible statute because the prosecutor charges one of the alternatives.⁵⁴ So when the defendant pled guilty in a prior conviction, the sentencing court could scrutinize the terms of the plea agreement and transcript of colloquy between the judge and defendant to determine which alternative version he pled to.⁵⁵ However, the modified categorical approach also applies when a jury finds a defendant guilty of a crime under a divisible statute.⁵⁶ Since the judge instructs the jury which alternative element of the offense is charged, if the alternative comports with the generic crime, then the jury must necessarily find all of the elements of the generic crime.⁵⁷ In order to determine if the jury found the defendant guilty of the generic offense, the sentencing court may scrutinize a limited set of documents (i.e. the indictment and jury instruction).⁵⁸

C. *How the Enhancement Works*

Under the ACCA, the instant offense tried before a jury is the possession of a firearm prohibition under 18 U.S.C. § 922(g). The Supreme Court has held in a broad sense that a defendant's prior convictions do not need to be set forth in the indictment or proved to a jury beyond a reasonable doubt.⁵⁹ Rather, once the jury renders a guilty verdict for a felon in possession, then the sentencing court judge considers the defendant's prior record for the requisite three prior convictions.⁶⁰ Using the categorical approach or the modified categorical approach, if the sentencing judge finds three predicate convictions by a

51. *Id.*

52. *Id.* (citing *Shepard v. United States*, 544 U.S. 13, 16 (2005)).

53. *Id.* at 2285.

54. *Descamps*, 133 S. Ct. at 2284.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 2281.

59. *Almendarez-Torres v. United States*, 523 U.S. 224, 226–27 (1998).

60. *See Descamps*, 133 S. Ct. at 2283.

preponderance of the evidence, then the sentencing range increases from a maximum of ten years to not less than fifteen years.⁶¹ The judge uses the existence of the prior convictions along with the instant offense to sentence the defendant within the range provided by the ACCA.

Courts base their adjudicative procedures for the ACCA on two cases: *Almendarez-Torres v. United States*⁶² and *Apprendi v. New Jersey*.⁶³ Courts rely on *Almendarez-Torres* to categorize the ACCA as a sentencing-enhancement penalty provision, rather than a new, separate offense.⁶⁴ Consequently, the ACCA's predicate convictions are not required to be charged in the indictment and proved to a jury beyond a reasonable doubt.⁶⁵ The Supreme Court's holding in *Apprendi* authorizes a judge to look only at the fact of the prior convictions, rather than the defendant's conduct in those convictions, when imposing a sentence under the ACCA.⁶⁶

In *Almendarez-Torres*, the Supreme Court held in a 5–4 decision that a sentencing judge (rather than a jury) may determine a fact of a defendant's prior conviction by a preponderance of the evidence (rather than beyond a reasonable doubt) to sentence a defendant in excess of a statutory maximum.⁶⁷ The statute at issue in *Almendarez-Torres*, 8 U.S.C. § 1326(b)(2), raises the penalty from a maximum of two years to twenty years for a deported alien who returns to the United States if the alien has a prior conviction for an aggravated felony.⁶⁸ The issue before the Court was whether this statute manifests a penalty provision or a new substantive crime.⁶⁹ If the statute is merely a penalty provision that authorizes an enhanced sentence, then the Government is not required to charge the fact of the earlier felony conviction in the indictment because the earlier conviction is relevant only to the sentencing of a defendant found guilty of the charged crime.⁷⁰ However, if the statute sets forth a new crime, the prior felony conviction must be charged in the indictment and proved to a jury beyond a reasonable doubt.⁷¹ The Court

61. See *id.* at 2294 (Thomas, J., concurring).

62. *Almendarez-Torres*, 523 U.S. at 224.

63. See *Apprendi v. New Jersey*, 530 U.S. 466, 487–90 (2000).

64. See *Descamps*, 133 S. Ct. at 2295 (Thomas, J., concurring).

65. *Id.* at 2288.

66. *Id.* at 2294 (Thomas, J., concurring).

67. *Almendarez-Torres*, 523 U.S. at 226–27.

68. *Id.* at 226.

69. *Id.*

70. *Id.* The charged crime in this case was 8 U.S.C. § 1326(a), which prohibits a deported alien from returning to the United States. 8 U.S.C. § 1326(a) (2012).

71. See *Patterson v. New York*, 432 U.S. 197, 204 (1977) (noting that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all elements included in the definition of the offense of which a defendant is charged); see also *In re Matter of Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except

indicated that statutes authorizing higher sentences for recidivists do not create a separate offense with new elements.⁷² Rather, the Court identified the fact of a prior conviction as a mere sentencing factor that the sentencing judge determines by a preponderance of the evidence.⁷³

The Court grounded its decision on Congressional intent.⁷⁴ The definition of a criminal offense is entrusted to the legislature.⁷⁵ As such, Congress decides whether a prior conviction in a statute helps to define a separate crime or operates as a sentencing factor.⁷⁶ The Court noted that the legislative history of § 1326(b)(2) contained no language to suggest Congress intended to create a new substantive crime.⁷⁷

In *Apprendi*, the Supreme Court held that other than the fact of a prior conviction, any fact that increases penalty for a crime beyond the prescribed statutory maximum must be charged in the indictment and proved beyond a reasonable doubt to a jury.⁷⁸ The Fifth and Sixth Amendments guarantee a jury, standing between a defendant and the power of the State, to find any disputed fact essential to increase the ceiling of a potential sentence.⁷⁹ Furthermore, the Sixth Amendment guarantees fair notice of every element of a crime that the law makes essential to the punishment to be inflicted.⁸⁰

II. ARGUMENT

A. *Expressions by Supreme Court Justices*

The ACCA is codified in 18 U.S.C. § 924(e). One of the ACCA's neighboring provisions, 18 U.S.C. § 924(c), also uses the "not less than" language without any expressed maximum sentence. In *United States v. O'Brien*, the defendant was prosecuted under § 924(c) for brandishing a firearm in relation to a crime of violence.⁸¹ 18 U.S.C. § 924(c)(1)(B) prescribes a sentence of "not less than 30 years" if the firearm was a machine gun.⁸² The

upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

72. *Almendarez-Torres*, 523 U.S. at 226.

73. *Id.* at 235.

74. *Id.* at 228.

75. *Id.*

76. *Id.*

77. *Almendarez-Torres*, 523 U.S. at 233–34.

78. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

79. *Shepard v. United States*, 544 U.S. 13, 25 (2005).

80. *Apprendi*, 530 U.S. at 507.

81. *United States v. O'Brien*, 560 U.S. 218, 222 (2010) (the actual issue in the case was whether the fact that a firearm was a machine gun should be an element or a sentencing factor).

82. 18 U.S.C. § 924(c)(1)(B) (2012).

Court ultimately never resolved whether the statute contained a fixed sentence of 30 years or an implied life maximum.

However, three Supreme Court Justices expressed serious doubts during the oral argument, without disagreement from anyone else on the bench, when the Government suggested the “not less than” language implied a life maximum.⁸³

Justice Scalia voiced skepticism: “Where – where is the life sentence maximum, by the way? . . . Where is that specified?”⁸⁴ When the Government responded that lower courts have understood the statute to imply a maximum of life, Justice Scalia turned to the text of the statute: “Where—where do you get the life maximum? I—I’m reading through, and there’s – it mentions nothing about life. . . . And if it mentions nothing about life, then these are not mandatory minimums. To the contrary, they are—they are new maximums.”⁸⁵

The Government asserted that the “not less than” language can only mean that a higher sentence would be appropriate, which prompted Justice Ginsburg to express puzzlement: “Where do you get the maximum? You say oh, these are just minimums. . . . But where is—where is the maximum?”⁸⁶

Justice Sotomayor raised a constitutional concern with the Government’s position, “Is there a Sixth Amendment problem with reading a statute this way, with—with reading a statute to provide for an unlimited maximum when Congress hasn’t specified it, and now you’re going to have the judge find the minimum and the maximum?”⁸⁷

The Government reiterated its belief that the “not less than” language implied a maximum term of life. This answer troubled Justice Scalia: “I don’t find that implied at all. I don’t see why it’s implied.”⁸⁸

Justice Sotomayor again admonished the Government about a constitutional problem with their position and then endorsed Justice Scalia’s earlier interpretation: “Isn’t there a Sixth Amendment problem with not knowing what you are exposed to? And then doesn’t the minimum in that case sort of become de facto the maximum?”⁸⁹

The Supreme Court in *O’Brien* never ruled whether the “not less than” language constitutes a fixed term or a thirty-to-life sentencing range because it was unnecessary to decide the central issue in the case.⁹⁰ Nevertheless, the three Justices’ above-stated viewpoints attest to the “not less than” language

83. *United States v. Walker*, 720 F.3d 705, 708 (8th Cir. 2013).

84. Transcript of Oral Argument at 13, *United States v. O’Brien*, 560 U.S. 218 (2010) (No. 08-1569).

85. *Id.*

86. *Walker*, 720 F.3d at 708; Transcript of Oral Argument, *supra* note 84, at 14.

87. Transcript of Oral Argument, *supra* note 84, at 15.

88. *Id.*

89. *Id.*

90. *Walker*, 720 F.3d at 710.

providing a fixed-term of years when an expressed statutory maximum is absent.

B. Stimpson v. Pond and Lin v. United States

These interpretations articulated by the three Justices reflect a court opinion written by one of their predecessors on the bench more than 150 years ago. While riding circuit in the mid-1800s, Justice Curtis held in *Stimpson v. Pond* that a federal statute prescribing “a penalty of not less than one hundred dollars . . . d[id] not authorize the infliction of a greater penalty than one hundred dollars.”⁹¹ Rather, the “act authorize[d] the infliction of a penalty of just one hundred dollars for the offence described[.]”⁹² Justice Curtis reasoned that the “[p]ower to inflict a particular penalty must be conferred by Congress in such terms as will bear a strict construction[.]” and the power was “exhausted by imposing a penalty of just one hundred dollars.”⁹³

Justice Curtis specifically rejected the notion of an implied maximum above the prescribed penalty: “mere implication can hardly ever be a safe ground on which to rest a penalty, and when penalties of unlimited magnitude are the subjects of the implication, the danger of making it, and the improbability of its correctness, are proportionately increased.”⁹⁴ The phrase “not less than,” with no accompanied maximum, “requires stronger implication than is found in the language” to provide a penalty above the expressed term.⁹⁵

Later, in the early 1900s, in *Lin v. United States*, the Eighth Circuit confronted a similar statute in an imprisonment context and reached the same conclusion.⁹⁶ The federal statute at issue prescribed a penalty of “not less than five years” without an expressed maximum sentence for a particular drug offense.⁹⁷ The Eighth Circuit explicitly rejected the availability of a life-imprisonment sentence under the statute.⁹⁸ Citing *Stimpson*, the Eighth Circuit held the “statute fixes a certain punishment of five years.”⁹⁹

Both *Stimpson* and *Lin* remain good law; neither has been overruled or modified. This foundation set by Justice Curtis, held by the Eighth Circuit, and echoed by Justices Ginsburg, Scalia, and Sotomayor should instruct the interpretation of “not less than” in the ACCA because they contemplated the language in a very similar context.

91. *Stimpson v. Pond*, 23 F. Cas. 101, 102 (D. Mass. 1855).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Lee Mow Lin v. United States*, 250 F. 694, 695 (8th Cir. 1918).

97. *Id.*

98. *Id.*

99. *Id.*

C. *Legislative History and Intent*

If a statute is susceptible to more than one meaning, the legislative history should be reviewed to determine congressional intent.¹⁰⁰ In order to inform the correct interpretation of the clause “not less than fifteen years,” it is helpful to examine the meaning of the phrase as indicated by the congressmen who authored and enacted the statute.

Senator Arlen Specter originally proposed a career criminal bill in 1981.¹⁰¹ This bill was rejected and modified several times before eventually being passed into law as the Armed Career Criminal Act of 1984. In its first version of the bill, Congress made it a federal offense for a defendant to commit any robbery or burglary with a firearm if such defendant had two or more previous robbery or burglary convictions under either federal or state laws.¹⁰² Congress drafted an extremely harsh sentencing phrase mandating that a career criminal “upon conviction shall be sentenced to imprisonment for life.”¹⁰³

After several hearings, however, Congress proposed a reduced sentence declaring that offenders “shall . . . be sentenced to a term of imprisonment of not less than fifteen (15) years *nor more than life*”¹⁰⁴ This amendment was significant, indicating that Congress did not want to require a life sentence in every case, but rather provide a range of penalties.¹⁰⁵ Notably, Congress inserted the phrase “nor more than life” to define a sentencing range of fifteen years to life in this bill.¹⁰⁶ Congress noted that a rapid decline in criminal propensities once career criminals reached the age of thirty convinced them to reduce the imprisonment term.¹⁰⁷

President Reagan vetoed the 1982 bill for federalism reasons; he was concerned that the law’s jurisdictional interplay between federal and local prosecutors would produce strained relationships because it federalized traditionally local crimes of armed robbery and armed burglary.¹⁰⁸ In response, Congress redrafted the bill to proscribe felons with three prior robbery or

100. Jill C. Rafaloff, *The Armed Career Criminal Act: Sentence Enhancement Statue or New Offense?*, 56 FORDHAM L. REV. 1085, 1091 (1988).

101. *Career Criminal Life Sentence Act of 1981: Hearing on S. 1688 Before the Subcomm. on Juvenile Justice of the S. Comm. on the Judiciary*, 97th Cong. 3 (1981).

102. *Id.* at 4.

103. *Id.*

104. S. REP. NO. 97-585, at 3 (1982) (emphasis added).

105. *See id.* at 77.

106. *Id.* at 3.

107. *Id.* at 77.

108. *See* S. REP. NO. 98-190, at 3 (1983) (“President Reagan declined to sign the [larger crime package of which the bill was a part] He also expressed concern about the jurisdictional nature of the local prosecutor’s ‘veto’ power over Federal prosecutions contained in the career criminal portion of the bill.”).

burglary convictions from receipt, possession, or transportation of firearms.¹⁰⁹ This allowed for federal imprisonment of career criminals without radically expanding federal jurisdiction over common law crimes.¹¹⁰ It merely served as an enhanced penalty for a three-time felon convicted of the underlying federal offense—felon in receipt, possession, or transportation of firearms.

Congress revised the bill's sentencing provision to state that career criminals "shall be . . . imprisoned not less than fifteen years."¹¹¹ Congress completely eliminated the "nor more than life" wording from the bill.¹¹² Additionally, Congress replaced the phrase "be sentenced to a term of imprisonment of" with the term "imprisoned."¹¹³ This specific language was duplicated in the Armed Career Criminal Act of 1984 and still functions as the imprisonment language in the ACCA today.¹¹⁴

Several individual legislators provided commentary during hearings regarding the ACCA's sentencing language. Even though a number of individual legislators proposed that the ACCA implied a sentencing range with a life maximum,¹¹⁵ there were also statements that suggested a fixed term of fifteen years.¹¹⁶ The Supreme Court has expressed misgivings about the credibility of remarks by individual legislators: "First, the views of a single legislator, even a bill's sponsor, are not controlling[,]";¹¹⁷ rather, they express the views of only one member of a committee.¹¹⁸ Furthermore, none of these comments addressed the *changes* in imprisonment language that occurred from 1982 to 1983. Therefore, these comments are unavailing to the correct interpretation of the ACCA's penalty because they connote a variety of

109. H.R. REP. NO. 98-1073, at 5–6 (1984).

110. *Id.*

111. *Hearings on S. 52, supra* note 21, at 8.

112. *Id.* at 5.

113. *Id.*

114. 18 U.S.C. § 924(e)(1) (2012); H.R. REP. NO. 98-1073, at 7–8.

115. *Armed Career Criminal Act: Hearing on H.R. 1627 and S. 52 Before the Subcomm. on Crime of the H. Comm. On the Judiciary*, 98th Cong. 13 (1984) [hereinafter *Hearing on H.R. 1627 and S. 52*] (statement of Sen. Arlen Specter) ("[A]nd minimum mandatory sentences of fifteen years to life."); *Hearing on S. 52, supra* note 21, at 11 (statement of James Knapp, Deputy Assistant Att'y Gen., Criminal Division) ("If found guilty, a defendant so prosecuted would have to be sentenced to imprisonment for 15 years to life imprisonment.").

116. H.R. REP. NO. 98-1073, at 5 (1984) ("[T]he mandatory 15-year penalty is available."); *Hearing on S. 52, supra* note 21 (statement of William Cahalan) ("[The ACCA] provides certain . . . punishment. . . . [C]ertainty of punishment is critical to the deterrence of criminal activity and protection of the community."). Merriam-Webster defines 'mandatory' as "required by law or rule." *Mandatory Definition*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/mandatory> (last visited Jan. 20, 2015). The 15-year penalty is required. *Hearing on H.R. 1627 and S. 52, supra* note 115, at 37 (statement of Rep. Ron Wyden) ("[W]ould face a mandatory 15-year sentence in prison, with no eligibility for parole.").

117. *Mims v. Arrow Fin. Servs.*, L.L.C., 132 S. Ct. 740, 752 (2012).

118. *Chickasaw Nation v. United States*, 534 U.S. 84, 92–93 (2001).

meanings and Congress's actions speak louder than its individual members' words.

More important is what Congress wrote down and eventually passed as legislation.¹¹⁹ The following two modifications in the imprisonment language from 1982 to 1983 collectively reveal Congress's intention to foreclose the availability of a life sentence:¹²⁰ revoking the "nor more than life" upper boundary and inserting "imprisoned" in place of the phrase "sentenced to a term of imprisonment."

First, Congress deleted the words "nor more than life" prior to enacting the ACCA into law, which signifies that Congress did not intend to authorize a sentencing range up to life imprisonment. The Supreme Court has pointed out that "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."¹²¹ This casts serious doubt on the idea that Congress intended an implied maximum of life imprisonment after discarding the "nor more than life" language. Furthermore, the Supreme Court has reasoned that if Congress sought to grant something in a statute, it would not intentionally substitute a confusion-generating term for pre-existing language that unambiguously carried out that objective.¹²² In the ACCA, "not less than fifteen years" is a confusion-generating term substituted in place of the pre-existing language "not less than fifteen years nor more than life," which unambiguously carried out the objective of imposing a fifteen years to life sentencing range. It follows that Congress would not remove the unambiguous provision in the 1982 bill if it intended to impose a life maximum in the ACCA. Deletion of a provision from a bill "strongly militates against a judgment that Congress intended a result that it expressly declined to enact."¹²³ Certainly, interpreting the substituted confusing language identical to the deleted unambiguous language is particularly dangerous when one's liberty depends on the interpretation. Accordingly, Congress's abandonment of the "nor more than life" provision suggests it did not intend the ACCA to contain life imprisonment as a maximum.

Secondly, the "shall be . . . imprisoned not less than fifteen years" provision does not implicitly grant a life maximum sentence, but rather underscores Congress's pressing desire that ACCA offenders actually serve an entire fifteen year prison sentence. In a Senate report on September 24, 1982,

119. See *Mims*, 132 S. Ct. at 752 n.15.

120. *Hearing on S. 52, supra* note 21, at 5 ("[S]hall be . . . imprisoned not less than fifteen years . . ."); S. REP. NO. 97-585, at 3 (1982) ("[S]hall . . . be sentenced to a term of imprisonment of not less than fifteen (15) years nor more than life. . .").

121. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987).

122. See *Chickasaw Nation v. United States*, 534 U.S. 84, 92 (2001).

123. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974).

Congress said the goal of the ACCA was to provide a new federal offense to improve public safety by “incapacitat[ing] the armed career criminal for the rest of the normal time span of his career which usually starts at about age 15 and continues to about age 30.”¹²⁴ Congress expressed concern with judiciaries imposing ultra-lenient prison sentences on repeat offenders and parole boards releasing inmates well before the end of their sentence.¹²⁵ By failing to adequately confine these offenders, courts and parole boards endangered their communities because they allowed these repeat felons to continue their careers as criminals.¹²⁶ In order to protect these communities, Congress continually emphasized that the ACCA must prescribe a *certain* and substantial punishment—meaning no probation, suspended sentence, sentence less than fifteen years, or parole.¹²⁷

In light of this purpose, it is particularly telling that Congress inserted the word “imprisoned” in place of “sentenced to a term of imprisonment” in the ACCA. Pursuant to the initial language, “shall be . . . *sentenced* to a term of imprisonment not less than fifteen years nor more than life,” indicates the court must order a punishment between fifteen years and life imprisonment.¹²⁸ However, this provision does not contemplate a suspended sentence or parole because the verb “sentenced” only concerns the pronouncement of the sentence by the court.¹²⁹ Consequently, this language enabled judges to evade the ACCA’s required sentence by issuing a sentence for fifteen years, but then suspending the execution of that sentence (i.e. giving probation). Furthermore, unless expressly stated otherwise in the act, a criminal sentenced under the 1982 bill’s language could be released on parole well before serving the entire fifteen years. This difference is significant because Congress discussed during Senate and House hearings that many prisoners’ actual physical time spent in prisons was much less than the sentences given by courts prior to the ACCA’s enactment.¹³⁰

Congress manifested its effort to ensure a *certain* punishment of fifteen years actually served in prison with its word choice in the 1983 bill.¹³¹ Unlike the term “sentenced” in the 1982 bill, the verb “imprisoned” necessarily requires that both of the following cannot be less than fifteen years: the sentence issued by the court and the criminal’s physical presence in prison. In this context, “imprisoned” signals to courts and parole boards that no

124. S. REP. NO. 97-585, at 7.

125. *Id.* at 34.

126. *See supra* text accompanying notes 20–22.

127. *Hearing on S. 52, supra* note 21, at 8.

128. *Id.* (emphasis added).

129. *See supra* text accompanying notes 113–16.

130. *See supra* text accompanying notes 125–31.

131. *See supra* note 116 and accompanying text.

probation, suspension of sentence, sentence less than fifteen years (whether the defendant pleads guilty or is convicted following a trial), or parole shall be imposed upon an individual punished under the ACCA. Since Congress incorporated the word “imprisoned” at the same time it eliminated the “nor more than life” upper bound, it follows that Congress was creating a certain punishment, or “new maximums,” in accordance with the abovementioned three Supreme Court Justices’ opinions in the *O’Brien* oral argument.¹³²

This interpretation advances the congressional objective to incapacitate armed career criminals for the rest of their careers, which usually starts “at about age 15 and continues to about age 30.”¹³³ Given that the average prison sentence for armed career criminals at this time was less than four years, an enhanced fixed-term of fifteen years imprisonment comports with Congress’s statutory language modifications, establishes a certain and substantial punishment, and prudently anticipates the potential for prisons overcrowding.¹³⁴ Accordingly, the “shall be . . . imprisoned not less than fifteen years” language does not permit a sentence longer than fifteen years; rather it establishes a fixed term and at the same time prohibits courts and parole boards from relieving an ACCA offender of the required fifteen-year confinement.¹³⁵

D. Structure And Text

The ACCA’s neighboring subsections within Section 924 reveal that Congress did not intend the ACCA’s imprisonment provision to establish a range up to life. Under Subsections 924(c), 924(j), and 924(o), Congress expressly provided that certain acts are punishable by “any term of years *or for life*.”¹³⁶ The Supreme Court has reiterated, “[w]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate . . . exclusion” and it should not be implied in the section where it is excluded.¹³⁷ Since Congress expressed a life maximum in three neighboring subsections, the absence of any language in the ACCA (924(e)) specifying a life maximum demonstrates Congress acted intentionally and purposely in the disparate exclusion. To be sure, Congress omitted the “nor more than life”

132. See *supra* text accompanying notes 83–90.

133. See *supra* note 124, at 7.

134. See *supra* text accompanying notes 19–20.

135. 18 U.S.C. § 924(e)(1) (2012) (emphasis added).

136. *Id.* § 924(c)(5)(B)(i) (emphasis added); *Id.* § 924(j)(1) (2012) (emphasis added). See also *id.* § 924(o). Also, 18 U.S.C. § 924(c)(1)(C)(ii) has the following imprisonment provision: “[B]e sentenced to imprisonment for life.” *Id.* § 924(c)(1)(C)(ii).

137. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

upper boundary from the ACCA's text prior to its enactment. Therefore, imposing a life maximum into the ACCA contravenes the duty of courts to refrain from reading a particular phrase into a statute when Congress has left it out.¹³⁸

Furthermore, the public law illustrates that Congress routinely specified a life maximum when it wished to define such an upper boundary in statutory sentencing ranges during the time the ACCA was enacted. Several acts codified alongside the ACCA in P.L. 98-473 expressly define penalties with maximums of life imprisonment: Section 503(a) provides "not less than three years and not more than life imprisonment"; Sections 1002(a) and 2002(a) provide imprisonment for "any term of years or for life."¹³⁹ Congress codified the ACCA along with Sections 503(a), 1002(a), and 2002(a) in P.L. 98-473 on October 12, 1984, one year after deleting the ACCA's life maximum provision.¹⁴⁰ It is implausible that Congress intended this life maximum it deleted to be implied in the "not less than fifteen years" language when Congress expressly established a life maximum in several other acts codified in the same public law.¹⁴¹

Courts that erroneously impose a maximum penalty of life imprisonment onto the ACCA render § 924, P.L. 98-473, and numerous other federal criminal statutes superfluous. As previously discussed, several of the ACCA's neighboring provisions in § 924 and P.L. 98-473 explicitly define a maximum penalty of life. Similarly, outside of § 924, Congress has enacted dozens of statutory sentencing ranges of "not less than" a specified term of years or "for life."¹⁴² For example, the sentencing range for sex trafficking of children by

138. *Id.* at 208.

139. Joint Resolution Making Appropriations for the Fiscal Year 1985, and for Other Purposes, Pub. L. No. 98-473, 98 Stat. 2069, 2137, 2186 (1984).

140. *Id.*; *see, e.g.*, *Field v. Mans*, 516 U.S. 59, 75 (1995) ("The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects[.]").

141. *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").

142. *See* 18 U.S.C. § 33(b) (2012) (sentencing range for damaging a motor vehicle carrying radioactive waste with intent to endanger safety is "imprison[ment] for any term of years not less than 30, or for life"); *id.* § 175c(c)(1) (sentencing range for possessing or transferring variola virus is "a term of imprisonment not less than 25 years or to imprisonment for life"); *id.* § 175c(c)(2) (sentencing range for using variola virus is "imprison[ment] for not less than 30 years or imprisonment for life"); *id.* § 225 (sentencing range for organizing a financial crime enterprise is "imprison[ment] for a term of not less than 10 years and which may be life"); *id.* § 1121(b)(1) (sentencing range for killing a correctional officer by an inmate is "a term of imprisonment which shall not be less than 20 years, and [defendant] may be sentenced to life imprisonment or death"); *id.* § 1591(b)(1) (sentencing range for sex trafficking of children by

force or of a child under fourteen years of age is “imprisonment for any term of years not less than 15 or for life.”¹⁴³ Accordingly, implying an unstated life

force or of a child under 14 is “imprisonment for any term of years not less than 15 or for life”); *id.* § 1591(b)(2) (sentencing range for sex trafficking of children between 14 and 18 is “imprisonment for not less than 10 years or for life”); *id.* § 1658(b) (sentencing range for extinguishing a light with intent to bring a ship into danger is “imprison [ment for] not less than ten years and [the defendant] may be imprisoned for life”); *id.* § 2241(c) (sentencing range for aggravated sexual abuse of a child is “imprison[ment] for not less than 30 years or for life”); *id.* § 2251(e) (sentencing range for a second conviction of sexually exploiting a child is “imprison[ment] not less than 35 years nor more than life” and for sexually exploiting a child where death results is “punish[ment] by death or imprison[ment] for not less than 30 years or for life”); *id.* § 2251A(a) (sentencing range for selling or buying a child related to sexual conduct is “imprisonment for not less than 30 years or for life”); *id.* § 2252A(g) (sentencing range for engaging in child exploitation enterprise is “imprison[ment] for any term of years not less than 20 or for life”); *id.* § 2332g(c)(1) (sentencing range for transferring or possessing missile systems designed to destroy aircraft is “imprisonment not less than 25 years or to imprisonment for life”); *id.* § 2332g(c)(2) (sentencing range for using missile systems designed to destroy aircraft is “imprison [ment] for not less than 30 years or imprison[ment] for life”); *id.* § 2332h(c)(1) (sentencing range for transferring or possessing radiological dispersal devices is “imprisonment not less than 25 years or to imprisonment for life”); *id.* § 2332h(c)(2) (sentencing range for using radiological dispersal devices is “imprison[ment] for not less than 30 years or imprison[ment] for life”); *id.* § 2423(a) (sentencing range for transporting minors to engage in criminal sexual activity is “imprison[ment] not less than 10 years or for life”); *id.* § 3559(f)(1) (sentencing range for murdering a child less than 18 is “imprison[ment] for life or for any term of years not less than 30”); *id.* § 3559(f)(2) (sentencing range for kidnapping or maiming a child less than 18 is “imprison[ment] for life or for any term of years not less than 25”); *id.* § 3559(f)(3) (sentencing range for committing a crime of violence causing serious bodily injury to a child less than 18 is “imprison[ment] for life or for any term of years not less than 10”); 21 U.S.C. § 841(b)(1)(A) (2012) (sentencing range for manufacturing or distributing certain quantities of controlled substances is “not less than 10 years or more than life” or “not less than 20 years or more than life” if death or serious bodily harm results or if the violation was committed after a prior conviction for a felony drug offense); *id.* § 841(b)(1)(B) (sentencing range for manufacturing or distributing certain quantities of controlled substances, if death or serious bodily injury results, is “not less than 20 years or more than life” or “not less than 10 years or more than life” if the violation was committed after a prior conviction for a felony drug offense); *id.* § 841(b)(1)(C) (sentencing range for manufacturing or distributing certain quantities of controlled substances, if death or serious bodily injury results, is “not less than twenty years or more than life”); *id.* § 848(a) (sentencing range for engaging in a continuing criminal enterprise related to controlled substances is “not [] less than 20 years and which may be up to life imprisonment” or, in the case of a second conviction, is “not [] less than 30 years and which may be up to life imprisonment”); *id.* § 960(b)(1) (sentencing range for importing or exporting a controlled substance is “not less than 10 years or more than life” or “not less than 20 years or more than life” if death or serious bodily harm results or if the violation was committed after a prior conviction for a felony drug offense); 42 U.S.C. § 2272(b) (2012) (sentencing range for possessing or transferring atomic weapons is “imprisonment not less than 25 years or to imprisonment for life” or, for using the weapons, “imprison[ment] for not less than 30 years or imprison[ment] for life”); *Petition for Writ of Certiorari at 16, Lucas v. United States*, No. 11-1536 (7th Cir. June 25, 2012).

143. *See* 18 U.S.C. § 1591(b)(1).

maximum in the ACCA violates the canon that courts must “construe statutes, where possible, so as to avoid rendering superfluous any parts thereof.”¹⁴⁴ More specifically, if the phrase “not less than fifteen years” were sufficient, by itself, to create a sentencing range of fifteen years to life, it would render superfluous the explicit grant of authority for life imprisonment by dozens of federal sentencing statutes.¹⁴⁵

Then, the superfluous “or for life” clause in dozens of statutory sentencing ranges would offend “a cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute.”¹⁴⁶ Congress did not intend to forgo an upper limit for sentences under the ACCA, thereby authorizing sentences of up to life imprisonment, because Congress explicitly authorized an upper boundary of life imprisonment for those offenses it thought warranted such a penalty.¹⁴⁷ Implying a life maximum in the ACCA would disregard the words “or for life” that operate as an upper boundary in many criminal statutes, in favor of words wholly absent from the ACCA. For that reason, courts should refrain from reading an unstated maximum sentence of life into the ACCA.¹⁴⁸

In order to comply with these canons of construction, the imprisonment provision of the ACCA is best understood as authorizing a fixed term of fifteen years. Congress pointedly did not define a life maximum in the ACCA. In fact, Congress expunged a life maximum in the ACCA prior to its enactment. The Supreme Court does “not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and [the Court’s] reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.”¹⁴⁹ Congress’s regular use of the “or for life” clause—which defines the upper boundaries in several of the ACCA’s neighboring subsections of 924, P.L. 98-473, and dozens of criminal statutory sentences—proves Congress clearly knows how to establish a sentencing range with a maximum of life imprisonment. Therefore, similar to *Stimpson*, an unstated life maximum is unwarranted in the ACCA because Congress would have expressly granted it as the upper boundary had it intended to do so. As Justice Sotomayor postulated in the *O’Brien* oral argument, the minimum should become the de facto maximum.

144. *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991).

145. Brief for Nat’l Ass’n of Criminal Def. Lawyers and Nat’l Ass’n of Fed. Defenders as *Amici Curiae* Supporting Petitioner at 13, *Alleyne v. United States*, 133 S.Ct. 2151 (2013) (No. 11-9335) [hereinafter Brief Supporting Petitioner].

146. *Williams v. Taylor*, 529 U.S. 362, 404 (2000).

147. See Brief Supporting Petitioner, *supra* note 145, at 7.

148. See *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (noting it is the duty of courts to refrain from reading a particular phrase into a statute when Congress has left it out).

149. *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005).

The countervailing surplusage argument—that a fixed-term interpretation would render the words “not less than” superfluous—overlooks the ACCA’s history and text. In 1983, Congress signaled a fixed sentence of fifteen years by simultaneously incorporating the language “shall be . . . imprisoned not less than fifteen years” and omitting the “nor more than life” upper bound.¹⁵⁰ As discussed above, Congress aligned the term “imprisoned”¹⁵¹ with the words “not less than” to inform judges that their regular practices of departing downward from required sentences, imposing probation, and suspending sentences are impermissible under the ACCA. Additionally, the “imprisoned not less than” language serves as notice to parole boards to deny the release of any prisoner sentenced under the ACCA. If Congress meant to grant the availability of a sentence more than fifteen years, it would not have removed the “nor more than life” language when it integrated the word “imprisoned.” Therefore, the phrase “not less than” in the ACCA is correctly interpreted to make crystal clear that judges needed to break their habit of imposing punishments below statutory-required imprisonment terms and the prisoner may not be released on parole.

This interpretation is not abstract. Courts very frequently imposed sentences below statutory-required terms prior to the ACCA’s enactment,¹⁵² and still today, a number of sentencing courts attempt to elude statutory ranges. As previously discussed, one of the ACCA’s neighboring subsections—§ 924(c)—authorizes a sentence “to a term of imprisonment of not less than 5 years.”¹⁵³ But prior to its amendment in 1998, the phrase “not less than” was absent from the penalty provision of § 924(c): “sentenced to imprisonment for five years.”¹⁵⁴ Despite the Supreme Court and all of the Circuits recognizing the language in § 924(c) to mandate a fixed sentence of five years,¹⁵⁵ several

150. See *Petition for Writ of Certiorari*, *supra* note 142, at 11–16.

151. Other subsections within 924 use the phrase “be sentenced to a term of imprisonment not less than” (the same phrase Congress used in the ACCA until it changed it in 1983) as opposed to the word “imprisoned not less than” in the ACCA. 18 U.S.C. §§ 924(c)(1)(A)(i)–(ii), (B)(i)–(ii), (C)(i) (2012). “Where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Keene Corp.*, 508 U.S. at 208.

152. See S. REP. NO. 98-190, at 7 (1983).

153. 18 U.S.C. § 924(c)(1)(A)(i). The previously discussed part was 924(c)(1)(B)(ii), which prohibits brandishing a machine gun in relation to a crime of violence and authorizes a sentence of “not less than 30 years.” This provision, 921(c)(1)(A)(i), is merely possession of any firearm during a crime of violence.

154. *Id.* § 924 (1996), *amended by* 18 U.S.C. § 924 (2006) (containing the same statutory sentencing language for the basic offense of possessing a firearm in relation to a crime of violence).

155. *Smith v. United States*, 508 U.S. 223, 227 (1993); *United States v. Harlan*, 130 F.3d 1152, 1152 (5th Cir. 1997); *Stanback v. United States*, 113 F.3d 651, 653 (7th Cir. 1997); *United States v. Goggins*, 99 F.3d 116, 117 (3d Cir. 1996); *United States v. Anderson*, 59 F.3d 1323,

district courts imposed lower sentences.¹⁵⁶ In *United States v. Higgs*, the district court imposed a sentence of three years under § 924(c).¹⁵⁷ Although the court acknowledged that § 924(c) facially stood for a five-year fixed sentence, it speculated that Congress might not have “adequately . . . consider[ed] certain [mitigating] factors.”¹⁵⁸ The language “sentenced to . . . five years,” by itself, does not *affirmatively* forbid an imposition of a sentence lower than five years. This reflected congressional uncertainty to the sentencing court in *Higgs*, so it departed downward from the fixed term of five years to impose a more fitting punishment of three years.

The ACCA more effectively establishes a certain punishment because its “imprisoned not less than” language affirmatively forbids the imposition of a lower sentence. Since the sentencing judge cannot look at the underlying facts of the defendant’s requisite convictions, and because the instant offense is merely possession of a firearm, it follows that many ACCA cases would tempt judges to depart downward from fifteen years. But Congress incorporated the ACCA’s penalty provision to ensure a concrete punishment. Unlike the penalty provision the *Higgs* court departed downward from, the words “imprisoned not less than” reinforce the ACCA’s prohibition on sentences shorter than fifteen years imprisonment, rather than grant an unstated life maximum penalty.

1328 (D.C. Cir. 1995); *United States v. Lindsay*, 985 F.2d 666, 670 (2d Cir. 1993); *United States v. Campusano*, 947 F.2d 1, 4 (1st Cir. 1991); *United States v. Hatch*, 925 F.2d 362, 363 (10th Cir. 1991); *United States v. Hamblin*, 911 F.2d 551, 555 (11th Cir. 1990); *United States v. Brown*, 915 F.2d 219, 223 (6th Cir. 1990); *United States v. Wilkins*, 911 F.2d 337, 339 (9th Cir. 1990); *United States v. Van Dyke*, 895 F.2d 984, 985 (4th Cir. 1990); *United States v. Goodface*, 835 F.2d 1233, 1236 (8th Cir. 1987).

156. See *United States v. Maddox*, 48 F.3d 791, 795 (4th Cir. 1995) (stating that “[t]he district court sentenced defendant to five years probation, notwithstanding the five-year mandatory minimum sentence required by his conviction . . . under 18 U.S.C. § 924(c).”); *United States v. Higgs*, 927 F.2d 597, 597 (4th Cir. 1991).

157. *Higgs*, 927 F.2d at 597.

158. *Id.* The penalty provisions under § 924(c) were amended in 1998 to “sentenced to a term of imprisonment for not less than [x] years” and separated into three different escalating terms based on whether the defendant possessed (not less than 5 years), brandished (not less than 7 years), or discharged (not less than 10 years) the firearm. 18 U.S.C. § 924(c)(1)(A)(i)–(iii) (2012). One sponsor of the bill seemed to think that the fixed-terms would remain with the addition of the “not less than” language when it was amended in 1998, explaining it would “[p]rovide a seven year sentence for ‘brandishing’” and “[r]aise the penalty to ten years if the gun is discharged.” 144 CONG. REC. S12,671 (daily ed. Oct. 16, 1998) (statement of Sen. DeWine). The presidential signing statement also reflected this notion. See Remarks on Signing Legislation to Provide Educational Assistance to Families of Slain Officers and Strengthening Penalties for Criminal Using Guns, 34 WKLY. COMP. PRES. DOC. 2307, 2309 (Nov. 13, 1998) (“[T]he bill I sign today will add 5 years of hard time to sentences of criminals who even possess firearms when they commit drug-related or violent crimes. Brandishing the firearm will draw an extra 7 years; firing it, another 10.”).

Nevertheless, it would misconstrue the surplusage canon to conclude the fixed-term interpretation of the ACCA renders the words “not less than” superfluous. In order to adhere with the canon, the construction must actually *avoid* a surplusage problem to be valid; it does not dictate the construction of a statute if that construction would create another surplusage problem. Under the ACCA, to interpret the words “not less than” to imply a life sentence is permitted would render superfluous the express specification of life maximums in the twenty-six statutory sentencing ranges mentioned above.¹⁵⁹ This interpretation would emasculate more statutory language than that to which it would assign meaning.¹⁶⁰ Since “the canon against surplusage merely favors that interpretation which avoids surplusage,”¹⁶¹ “that comparison weighs in favor of the fixed-term interpretation.”¹⁶²

E. Fair Notice and Other Policy Concerns

Due process requires that offenders of the ACCA not be required at peril of their liberty to speculate as to its meaning.¹⁶³ In *Stimpson*, Justice Curtis rejected the notion of an implied maximum above the prescribed penalty: “mere implication can hardly ever be a safe ground on which to rest a penalty, and when penalties of unlimited magnitude are the subjects of the implication, the danger of making it, and the improbability of its correctness, are proportionately increased.”¹⁶⁴ A life maximum in the ACCA poses an unconstitutional danger because it subjects its offenders to punishment that is not clearly prescribed.¹⁶⁵ Justice Sotomayor alluded to this concern in the *O’Brien* oral argument, specifically that offenders would not know what they are exposed to.¹⁶⁶ Vague sentencing provisions pose constitutional problems when they do not state with sufficient clarity the consequences of violating the criminal statute.¹⁶⁷

The rule of lenity, a vehicle courts use to apply fair notice principles, points to the fixed term-interpretation of the ACCA’s sentencing clause. The rule of lenity requires ambiguous laws to be interpreted in favor of the defendant subjected to them.¹⁶⁸ It applies to the substantive scope of criminal statutes and extends to the severity of sentence¹⁶⁹ because it is grounded in the

159. See *supra* note 142 and accompanying text.

160. Petition for Writ of Certiorari, *supra* note 142, at 16.

161. *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2043 (2012).

162. Brief Supporting Petitioner, *supra* note 145, at 15.

163. See *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

164. *Stimpson v. Pond*, 23 F.Cas. 101, 102 (D. Mass. 1855).

165. *United States v. Santos*, 553 U.S. 507, 514 (2008).

166. Transcript of Oral Argument, *supra* note 84, at 15.

167. *United States v. Batchelder*, 442 U.S. 114, 123 (1979).

168. *Santos*, 553 U.S. at 514.

169. *United States v. R.L.C.*, 503 U.S. 291, 305 (1992).

instinctive distaste against one languishing in prison unless the lawmaker has clearly said they should.¹⁷⁰ When an offender examines the ACCA's text, construction, and legislative history, a life maximum is not plainly visible. Rather, it would, at best, amount to a guess. Under the rule of lenity, when given two options, in order for a court to apply the harsher construction of the statute, its text must be plain and unmistakable.¹⁷¹

Furthermore, the adjudicative mechanism of the ACCA supports the imprisonment provision to constitute a fixed term of fifteen years. Prior to the enacted ACCA, the earlier bills proscribed an individual with two prior convictions from carrying a firearm *during* the commission of a robbery or burglary.¹⁷² But after President Reagan vetoed the bill, the enacted ACCA outlawed a person with three previous convictions from mere possession of a firearm.¹⁷³

Under the prior bills, the triggering offense proved to a jury would have been the third violent felony committed with a firearm.¹⁷⁴ For that reason, the sentencing judge would have been able to consider the defendant's conduct underlying the third conviction. For example, this enables the sentencing judge to consider whether the defendant's third conviction for armed robbery was committed with a starter gun or a machine gun;¹⁷⁵ whether it was motivated by a desperate family financial situation or merely a desire for excitement; whether the robber meant to inflict a greater harm or simply intended to pull off the armed robbery; whether the robber wielded a firearm himself or simply drove the getaway car; whether the victim was a blind newsstand operator or a person against whom the robber had legitimate grievances; whether the robber stole a loaf of bread or one million dollars; and whether the robber walked voluntarily into a police station to confess or desperately resisted capture.¹⁷⁶

170. *United States v. Bass*, 404 U.S. 336, 348 (1971); *see also R.L.C.*, 503 U.S. at 307–11 (Scalia, J., concurring) (agreeing that rule of lenity applies to sentencing statutes); Brief Supporting Petitioner, *supra* note 145, at 16.

171. *Bass*, 404 U.S. at 348.

172. *Hearing on H.R. 1627 and S. 52*, *supra* note 115, at 6 (emphasis added).

173. H.R. REP. NO. 98-1073, at 8 (1984).

174. *See* S. REP. NO. 98-190, at 20, 24 (1983).

175. The U.S. Code states:

[A] [f]irearm means any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of such weapon; or any firearm muffler or firearm silencer; or any destructive device. Such term shall include any handgun, rifle, or shotgun.

18 U.S.C. § 921(3) (2012). A starter gun is the gun used to signal the start of a track-and-field event.

176. *See* Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 556–57 (1978).

Unlike the prior bills, reading a life maximum into the current ACCA threatens disproportional sentencing because the above-mentioned Supreme Court holdings constrain a sentencing judge to consider only the *fact* of the three prior convictions. The core crime proved to a jury under the enacted ACCA is merely possession of a firearm. Therefore, the judge may review the underlying facts of that offense to determine the sentence.¹⁷⁷ But the Court in *Taylor* held that sentencing judges may “look only to the statutory definitions” of all three of the defendant’s prior offenses, not “to the particular facts underlying those convictions” disclosed by the record.¹⁷⁸ The *Descamps* majority recognized that “extending judicial fact-finding beyond the recognition of a prior conviction” to “try to discern what a trial showed, or a plea proceeding revealed, about a defendant’s underlying conduct” produces a “constitutional rub,” because “[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt.”¹⁷⁹ In other words, the sentencing judge may only find the charges on which the defendant was convicted, rather than what the defendant actually *did*, to determine the sentence.¹⁸⁰

Since courts examine what the predicate convictions necessarily involved—not the facts underlying the cases—courts must presume the convictions “rested upon [nothing] more than the least of th[e] acts” criminalized.¹⁸¹ As a result, a large available sentencing range from fifteen years to life is frequently unnecessary because courts are forbidden to increase a sentence based on most aggravating factors.

Furthermore, although the defendants’ constitutional rights forbid it, judges are tempted to examine the defendants’ conduct in their requisite prior convictions to determine the most proportional punishment.¹⁸² The existence of a life maximum in the ACCA persuades judges to convert a limited and narrowly applied assessment of the fact of a prior conviction into a device to evaluate the facts that the jury found.¹⁸³ But a fixed term of fifteen years would eliminate the broad discretion available to judges in the fifteen years to life range and necessarily remove this temptation.

177. Mere possession of firearm offenses typically do not create much disparity between sentences. If the defendant performs criminal conduct in connection with the firearm, a variety of other more exacting offenses are available to federal prosecutors to charge.

178. *Taylor v. United States*, 495 U.S. 575, 600 (1990) (emphasis added).

179. *Descamps v. United States*, 133 S. Ct. 2276, 2288 (2013).

180. *Id.* at 2283.

181. *Johnson v. United States*, 559 U.S. 133, 137 (2010); *see also Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684–85 (2013).

182. Petition for Writ of Certiorari at 11–15, *Davis v. United States*, No. 13-602 (4th Cir. Nov. 14, 2013).

183. *See Descamps*, 133 S. Ct. at 2287.

In addition to affording better protection to defendants' constitutional rights, a fifteen-year fixed term most effectively comports with the actual operation of the ACCA. The average sentence length in 2012 for criminals sentenced under the ACCA was fifteen years.¹⁸⁴ Even though the majority of circuits hold the ACCA implies a life maximum, the average sentence remains at fifteen years because the "imprisoned not less than fifteen years" clause serves as an affirmative directive to sentencing judges that imposition of a lower sentence is prohibited;¹⁸⁵ and because a higher sentence is typically unjustified as sentencing courts are precluded from examining the defendant's conduct underlying the requisite convictions and therefore must presume the convictions rested upon the least of the acts criminalized. Although the judge may consider the defendant's conduct underlying the instant offense, there is typically little disparity in possession of firearms cases because prosecutors charge more exacting firearm statutes if the firearm is brandished, discharged, or results in a death.¹⁸⁶

As a result, judges sentence ACCA offenders very consistently. But there are occasional deviations, and district court sentences within a statutory range are near impossible to overturn.¹⁸⁷ In view of appellate courts' reluctance to overturn within range sentences, an upper bound of life imprisonment based on mere implication is extremely dangerous.

CONCLUSION

No court has adequately explained why an absence of language giving the sentencing court discretion to sentence life imprisonment under the ACCA, nevertheless, means it may do so.¹⁸⁸ Rather, courts have simply grounded this finding on precedent.

However, these courts have not relied on all of the relevant precedent. The *Stimpson* and *Lin* courts thoroughly explained why the "not less than" language, without an expressed maximum, authorizes a fixed term penalty, and nothing higher. Three Supreme Court Justices reinforced this idea almost a century after *Lin* during the *O'Brien* oral argument. Without disagreement from anyone else on the bench, Justices Ginsburg, Scalia, and Sotomayor expressed their distrust when the Government suggested the "not less than" language implied a life maximum.

184. *Quick Facts*, *supra* note 12.

185. Petition for Writ of Certiorari, *supra* note 142, at 16. *See also supra* notes 148–54 and accompanying text.

186. *See* 18 U.S.C. § 924(c) (2012).

187. *Rita v. United States*, 551 U.S. 338, 370 (2007) (Scalia, J., concurring) (noting that a district court's within range sentence is absolute and unreviewable).

188. *United States v. Walker*, 720 F.3d 705, 709 (8th Cir. 2013) (Bright, J., concurring).

The legislature's actions when crafting the ACCA are also revealing. Prior to enacting the ACCA into law, Congress deleted the words "nor more than life" and inserted the word "imprisoned" in place of "sentenced to a term of imprisonment." In its current form, the "shall be . . . imprisoned not less than fifteen years" provision emphasizes Congress's aspiration that ACCA offenders actually serve an entire fifteen-year prison sentence. The verb "imprisoned" signals to courts and parole boards that no probation, suspension of sentence, sentence less than fifteen years, or parole shall be imposed upon an individual sentenced under the ACCA.

Since Congress expressed a life maximum in three neighboring subsections under § 924, the absence of any language in the ACCA specifying a life maximum shows that Congress acted purposely in the disparate exclusion. In addition, it is doubtful that Congress intended the life maximum it deleted to be implied in the "not less than fifteen years" language when Congress expressly established a life maximum in several other acts codified in the same public law. If the phrase "not less than fifteen years" were sufficient, by itself, to create a sentencing range of fifteen years to life, it would render superfluous the explicit grant of authority for life imprisonment by dozens of federal sentencing statutes. Therefore, an unstated life maximum is unwarranted in the ACCA because Congress would have expressly granted it as the upper boundary had it intended to do so. In the future, hopefully courts will fully recognize the ACCA's text, legislative history, and current adjudicative mechanism, along with past and current Supreme Court Justices' viewpoints when sentencing offenders under the ACCA.

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